# EXPERT TESTIMONY, — PREVALENT COMPLAINTS AND PROPOSED REMEDIES.[1]

IT is reported that a certain lawyer, in the trial of a case, having encountered the testimony of an expert witness called by his adversary, which threatened to ruin his cause, exasperated thereby and smarting under the sense of impending defeat, commenced his closing address to the jury as follows: "Gentlemen of the jury, there are three kinds of liars, — the common liar, the d—d liar, and the scientific expert."

This characterization was scarcely more severe than that which, in politer language, is bestowed upon learned and distinguished members of the medical profession, not only by defeated lawyers and their enraged clients, but also by eminent members of the legal profession, both lawyers and judges, as well as by worthy and respectable members of the general public outside of the professions involved. It is the voice of the people and of the press, as well as that of the bench and the bar. It is the fashion.

A judge of the Supreme Court of the United States has declared that "experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating the questions involved in the issue."[2]

In a recent trial of a criminal case in the city of New York, after a week had been consumed in hearing expert testimony upon a subject concerning which an equal number of doctors had testified exactly opposite to each other, and all with equal positiveness, the judge told the jury to put all the expert testimony out of their minds, and pay no attention to it.

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[1] This article is, in substance, the Address delivered before the New Hampshire Medical Society at its annual meeting, May 22, 1897. It was furnished by the author, at our request, for publication in the HARVARD LAW REVIEW. We regret to say that it represents the last legal work of the learned writer. Judge Foster died August 13, 1897. — ED.

[2] Winans *v.* N. Y. & N. E. Ry., 21 How. 101.

In the famous trial of Palmer, in England, in 1856, for the murder of Cook by poisoning, more than a dozen medical men and chemists testified with great positiveness, but in direct opposition to each other. Lord Chief Justice Campbell, in charging the jury, remarked: "With regard to the medical witnesses, I must observe that, although there were among them gentlemen of high honor, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness."

Professor John Ordronaux declared, in 1874: "There is a growing tendency to look with distrust upon every form of skilled testimony. Fatal exhibitions of scientific inaccuracy and self-contradiction cannot but weaken public confidence in the value of all such evidence. If Science, for a consideration, can be induced to prove anything which a litigant needs in order to sustain his side of the issue, then Science is fairly open to the charge of venality and perjury, rendered the more base by the disguise of natural truth in which she robes herself." And he adds: "Some remedy is called for, both in the interests of humanity and justice."

Clemens Herschel, civil engineer, has an article in 21 American Law Review, 571, full of complaints and scolding. According to him, the "prevalent method" is "*universally* condemned by judges, law-writers, experts themselves, and the jury." Such language is much too extravagant and unjust; it is manifest that the writer who speaks of the expert witness as "a man placed on the witness stand and condemned to say naught save in answer to ingeniously concocted, more or less rasping questions," must be very slightly acquainted with the "prevalent method," and must have had little observation of the style and manner of examination and cross-examination under the direction of discreet and enlightened judges in the New England courts.

Professor Charles F. Himes, in the Journal of the Franklin Institute, Vol. 135, p. 409, indulges in these remarks: "Perhaps the testimony which least deserves credit with a jury is that of the skilled witness. It is often surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judg-

ment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable of expressing a candid opinion. . . . They are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it."

It would be deplorable, indeed, if such criticisms were justified by the facts.

This "bias," or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness; and the inclination or partiality is often characterized by terms indicating dishonesty and corruption; but it is my belief, resulting from the observation and experience of many years, that there are few instances in which a scientific witness permits himself to testify or to be engaged on a side contrary to his convictions derived from a careful examination of the case.

It is not unnatural that a man of strong conviction (at the same time honest and unpurchasable) should become the earnest advocate of his theory, and the zealous assistant of the attorney in preparing, and to some extent conducting his case in court; and the attorney does well to secure his testimony and service (and would be negligent and wanting in fidelity to his client if he did not) by a suitable recognition of his value to him and his cause; and I agree with Professor Himes that there is no rule of ethics that should cause the witness to refuse the reward of his labor that would not apply equally to the attorney, so long as the testimony on the witness stand is without conscious untruth. On the other hand, neither is there anything in legal ethics to require a lawyer to select a lukewarm, half convinced representative of his theory of the case, and probably he never does. But the bias of the expert witness may not always be incidental to his calling or profession, but a purely scientific bias, due to some peculiar view or theory. Against such a bias no amount of self-restraint nor the most sensitive conscience will fortify a man. We all remember how, not many years ago, one of the gravest of all questions, a question involving the safety of the republic, was submitted to a tribunal composed of Senators and Representatives in Congress and Judges of the Supreme Court, — fifteen in all, — picked men, selected from those distinguished for their integrity and freedom from undue influence, and yet all the questions before the tribunal were decided

eight to seven; always the same eight, always the same seven, always along the same line of political division.[1] I do not suppose the tribunal was ever seriously distrusted; but the bias of those men was absolutely uncontrollable. It was the result of overwhelming circumstances, and not of depraved consciences.

It has been suggested, not without a considerable degree of truth, that one cause for the severe criticism to which the scientific expert has been subjected by men of the legal profession is, that "in many respects he seems to be a positive annoyance to lawyers and even to judges at times, a sort of intractable, incompatible, unharmonious factor, disturbing the otherwise smooth current of legal procedure; too important or necessary to be ruled out, too intelligent and disciplined mentally to yield without reason to ordinary rules and regulations of the court, with which he may not be familiar, and at the same time possessing an undoubted influence with a jury that it is difficult to restrict by the established rules and maxims of legal procedure."[2] I have seen such a witness on the stand. The spectacle was that of an honest, upright, learned, honorable, conscientious man, deserving and commanding respect and admiration.

Such as I have said being the voice of public opinion in general, the inquiry arises, Is it justified by the fact? That there would seem to be some warrant for this public sentiment, a few instances, falling within my own experience, will serve to illustrate.

In the trial of Le Page for the murder of Josie Langmaid, in 1874, blood-stained garments had been subjected to chemical and microscopical analysis. Dr. Horace Chase, Dr. J. B. Treadwell, and S. Dana Hayes, witnesses called by the State, all testified that blood corpuscles may be restored to perfect shape after the lapse of *ten years*, and that dried human blood can then be distinguished from that of common domestic animals. On the other hand, Drs. John B. Edwards and Gilbert R. Guilder of Montreal, witnesses for the defence, testified that after the lapse of *two weeks* it is impossible to restore dried corpuscles to their original size, and to distinguish with any certainty human blood from that of other mammalia.

Upon the trial of the Barker Will Case, in answer to the following hypothetical question: "Does occasional dizziness, a feeling of oppression in the head, inability temporarily to concentrate the

[1] 135 Jour. Frank. Inst. 427.

[2] 135 Jour. Frank. Inst. 411.

thoughts, difficulty about casting interest and adding up figures, manifested on two or three occasions, slight numbness and prickling sensations occasionally, temporarily cold extremities, — do all or any of these symptoms indicate existing disease of the brain? or do all or any of them indicate existing disease of the mind?"

Dr. A. answered: "They do not."

Dr. B. said: "The symptoms indicate chronic softening of the brain."

Dr. C.: "The symptoms do not necessarily indicate any disease of the brain."

Dr. D.: "No doubt whatever he had softening of the brain; his brain was rotten."

Dr. E.: "Such symptoms are very common. They do not indicate any brain disease."

Dr. F.: "They do."

Dr. G.: "They don't."

Dr. H.: "They do."

Dr. I.: "They don't."

Dr. J.: "They do."

The vote of the doctors was five to five. All these men were drawn from the highest ranks of their profession. I have no doubt that some of them were thoroughly honest; all may have been; for the case under consideration was one of mental disease, concerning which, perhaps more than any other subject of scientific investigation, learned men may honestly differ in opinion.

Mental disease or insanity, as every one is well aware, is one of the most frequent subjects of inquiry in courts of law, since it affects the capacity of individuals to commit crimes, to make legal contracts, and to dispose of their estates by will; and one reason why acknowledged experts sometimes differ so widely in their testimony on this subject, in the same case, is the almost insuperable difficulty of determining by any test and the highest degree of skill whether a man is insane or not. There seems to be very often some room for doubt. The mind in question may occupy a position in close proximity to the border lines which separate sanity from insanity; and those lines may be as difficult of discernment as the line which separates the twilight from the last remains of day.[1]

"It is true," said Lord Erskine, addressing a British jury, "that

[1] Professor Washburn, in 1 Am. Law Rev. 49.

in some cases the human mind is stormed in its citadel and laid prostrate under the stroke of frenzy. . . . There, indeed, all the ideas are overwhelmed, — for Reason is not merely disturbed, but driven wholly from her seat. . . . In other cases Reason is not driven from her seat, but Distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety. . . . And there are cases where imagination, within the bounds of the malady, still holds the most uncontrollable dominion over reality and fact; and these are the cases which frequently mock the wisdom of the wisest in judicial trials."

The New Hampshire courts have abandoned the attempt to formulate any legal definition of "unsound mind"; a scientific definition is impossible, and the courts of New Hampshire no longer make a capacity to distinguish between right and wrong, or the presence of delusions, the test of guilt or innocence in criminal accusations; but the sole inquiry is, Was the act complained of the product of mental disease? [1]

While upon this branch of our subject, it may not be irrelevant to allude to the ridiculous tendency among some professional men, both legal and medical, to make excuse for crime by increasing the number of mental diseases called insanity. The catalogue of such men includes moral insanity, insane impulse, insane delusion, monomania, dipsomania, kleptomania, pyromania, erotomania, theomania, homicidal mania, suicidal mania; and we have even heard of gamomania, or the insane desire to marry; frauenschustelmonomania, or the mania for stealing women's shoes; and frauenschlagermonomania, or the propensity for beating one's wife. For the cure of some of these fanciful maladies, I suggest that courts and penitentiaries are better fitted to provide effectual remedies than doctors and sanitariums. But I am digressing.

Professor Himes is of the opinion that "no class connected with the administration of justice is more frequently misunderstood or abused than medical men, unless perhaps we may except the legal fraternity itself; for the latter are often, by the laity, accused of bold mendacity, unscrupulous methods, and dishonest practices. And they sometimes even contribute to this popular impression by contradictions or even abuse and apparent mistrust of each other, even to a greater degree than scientific experts. And yet no one would hold the profession of the law less a necessity in the admin-

[1] State *v.* Jones, 50 N. H. 369.

istration of justice, or consider it fairly represented by cases that may be regarded, if they exist at all, as glaring exceptions, pictures all the more grotesque for the background of professional character upon which they are cast." [1]

While it is undoubtedly true that a large proportion of the public (including learned and experienced members of the legal, and even of the medical profession) entertain pessimistic views concerning the value of expert testimony, as it is ordinarily given and received in courts of justice, few, I imagine, would go so far in its condemnation as the New York judge, who told the jury to pay no attention to it. On the contrary, a moment's consideration must convince all reasonable men that it is of the greatest importance that a jury, or other tribunal charged with the duty of ascertaining the truth concerning a controverted matter, should be assisted by the knowledge and opinion of men specially trained in those matters of science and skill with which the ordinary juror and judge are unacquainted; and to exclude such means of information must, in innumerable instances, compel a denial of justice, imperil rights of life, liberty, and property, and destroy the safeguards of society.

A learned and practical chemist can tell (but I cannot, nor can any juror) whether the stains upon a garment are of blood or rust; and if of blood, whether it be the blood of man or beast; and yet upon the true answer to such an inquiry a human life may depend. So the question whether a death has been caused by poison can ordinarily be determined only by an experienced toxicologist. Indeed, the field of judicial investigation requiring the assistance of experts is illimitable. The anatomy of the human frame, the diseases of the human body, the derangement of the functions of the human brain, — in some form or other these are matters of daily investigation in the courts, and concerning all these things the average juror, lawyer, and judge is so profoundly ignorant that the search for truth, unaided by the knowledge and judgment of scientific and medical experts, would be utterly hopeless.

The validity of patents, and any and every case involving any subject of mechanics, the genuineness or fraudulent character of a signature or other writing, are a few among the many examples of the scope of this inquiry. We have recently seen it illustrated in respect to the navigation of a vessel, where the question

[1] 135 Jour. Frank. Inst. 412.

whether a sailor, in certain conditions, could leave the wheel long enough to commit a murder, became one of vital importance, although unfortunately it was answered in the affirmative and negative by an equal number of experienced sea-captains. And yet we seldom find, at least in this community, a doctor, or a chemist, or a toxicologist, or an inventor, or a sailor, upon the panel of jurors.

It has been said, with truth, that "the scientific expert is a product of an advanced and rapidly advancing civilization; that he has acquired an immensely increased importance, and a much wider field, and a far greater frequency of employment by the recent marvellous advances in the applications of science, — applications which have increased the sphere of things to be litigated about."

And expert testimony is admitted, not only from the *necessity* growing out of the advanced civilization of the age, but in accordance with a rule of law which requires the production of the *best* evidence. An illustration of the employment of the best evidence is furnished in the case of a man accused of poisoning his wife by giving her medicine containing arsenic. The chain of circumstances leading to the guilt of the accused was strong, but incomplete, — one link was wanting. There was no *positive* evidence that the draught of medicine contained arsenic. The cup which had contained the medicine was cracked by heating it on the stove, but the spilled liquid had been carefully wiped off by the accused. The question was put to four scientific experts whether arsenic could still be detected upon the stove after three months' constant use. Three of the experts said, "No"; the fourth thought that possibly it could. The accused, persuaded by his counsel and conscious that he had carefully removed the liquid, asked for an examination of the stove, which was granted. Half as much rust as would lie on the point of a knife was scraped off, and incontestable evidence of the presence of arsenic was obtained. The essential missing link was supplied. All the experts as well as the jury were satisfied. This experiment furnished the *best* evidence, obtainable only through the aid of skilled experts.

And so, Professor Himes truthfully remarks: "The public should be impressed with the fact that the testimony of scientific experts is an important factor in the trial of cases, becoming more and more important with the advancement of science in new and

as yet unexplored regions; that the courts *cannot exclude it, if they would;* and that the effect and value of the best evidence which the most advanced science can produce should not be impaired by fashionable and unjust assault and unnecessary taint."[1]

It is a settled rule of law in New Hampshire, that "experts may give their opinions upon questions of science, skill, or trade, or others of the like kind, or where the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or where it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it. . . . Upon subjects of general knowledge which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the testimony of witnesses as experts merely is not admissible."[2] A physician testifying as an expert may give an opinion founded upon his reading and study alone.[3] And, by statute, "the opinions of witnesses as to the value of any real estate, goods, or chattels may be received in evidence thereof when it appears to the court that they are qualified to judge of such value."[4]

Concerning the value and necessity of expert testimony, the courts in other jurisdictions have expressed their views in a multitude of judicial decisions. I cite a few instances.

"The opinion of a well instructed and experienced medical man, upon a matter within the scope of his profession and based on personal observation and knowledge, is, and ought to be, carefully considered and weighed by the jury."[5]

"The opinions of medical men are received with great respect and consideration, and properly so."[6]

"It is well settled that the knowledge and experience of medical experts is of great value in questions of insanity."[7]

"Medical testimony is of too much importance to be disregarded. When delivered with caution and without bias in favor of either party, or in aid of some speculative and favorite theory,

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[1] 135 Jour. Frank. Inst. 436.

[2] Jones *v.* Tucker, 41 N. H. 547; Winans *v.* N. Y. & N. E. Ry., 21 How. 101.

[3] Taylor *v.* Grand Trunk Railway, 48 N. H. 311.

[4] N. H. Pub. Stats., c. 224, s. 22.

[5] Flynt *v.* Bodenhamer, 8 N. C. 205.

[6] Thomas *v.* The State, 40 Texas, 65.

[7] Russell *v.* The Commonwealth, 86 Pa. St. 260; Jarrett *v.* Jarrett, 11 W. Va. 626; Choice *v.* The State, 31 Ga. 481.

it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound principles." [1]

The opinion of an expert should ordinarily be asked upon a hypothetical statement of facts.[2] Mr. Chief Justice Shaw states the rule thus: "In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued; either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is." [3]

"If the hypothetical question is clearly exaggerated and unwarranted by the testimony in the case, an objection to it will be sustained." [4]

"Counsel will not be permitted to embrace in a hypothetical question anything not proved or offered to be proved." [5]

The form of the question may be modified and shaped by the court.

"Questions need not be hypothetical when the expert is personally acquainted with the material facts of the case. Thus, if a physician visits a person, and from actual experience or observation becomes acquainted with his mental condition, he may give his opinion respecting such mental condition at the time; that is, he may state to the jury his opinion as to the sanity or insanity of the person at the time he observed or examined him." [6]

And where a medical expert had made a personal examination of the uterus of a deceased woman it was proper to ask him, "What in your opinion caused the death of the woman?" [7]

Great latitude of interrogation is sometimes permitted by the judge, in the exercise of his discretion.[8]

But, also, the court has judicial power to *limit* the range of testimony and of the examination within the "lines of reasonableness." [9]

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[1] Clark *v.* The State, 12 Ohio, 483.
[2] Willey *v.* Portsmouth, 35 N. H. 303; Spear *v.* Richardson, 37 N. H. 34.
[3] Dickinson *v.* Fitchburg, 13 Gray, 556.
[4] Muldowney *v.* Ill. Cent. Ry., 39 Iowa, 615.
[5] Fraser *v.* Jennison, 42 Mich. 227.
[6] State *v.* Felter, 25 Iowa, 75.
[7] State *v.* Glass, 5 Oregon, 73.
[8] 1 Greenl. Evid., § 449.
[9] Darling *v.* Westmoreland, 52 N. H. 411.

It will be observed that the most frequent and most serious complaint concerning expert testimony is the *want of agreement* upon the same subject and in the same case, among equally learned men, rendering their testimony (it is said) uncertain, confusing, and bewildering to the extent that it is unreliable and of little value; and yet I doubt if an intelligent, thoughtful, and candid man can be found, who will not admit that, notwithstanding all its faults and imperfections, it would be impossible to get along without it.

It is certainly true that there are and always will be differences of opinion among experts of the highest character, "rarely in regard to well-established facts, but often in regard to probable inferences from facts; whilst entire agreement in matters of theory and speculation would be marvellous." But concerning this alleged misfortune, it seems hardly becoming for the *legal* profession to indulge in severe criticism, since there is no profession so strongly characterized by differences of opinion on every subject, — lawyers as well as judges constantly disagreeing, and the latter not unfrequently overruling one another's decisions, — unless it be the clerical profession, the members of which, it may have been observed, are not entirely unanimous in their interpretations of the Holy Scriptures.

Yes, it is a visible truth that doctors, as well as lawyers and ministers of the Gospel, do disagree. It would be marvellous and deplorable if they did not. If there were no disagreement, investigation and experiment would cease; and science, literature, and art would sink to a dead level of stupidity and laziness. If scholars and learned men had come to a condition of unanimous agreement a hundred years ago, we should have had none of the marvellous discoveries and inventions, — none of the magnificent victories and triumphs in medicine and surgery, — that have distinguished and illuminated the closing years of the nineteenth century,

It will be observed that the faults and imperfections of the present system and methods of procedure in the matter of scientific testimony are not magnified to my vision.

For whatever is wrong and capable of redress, for so much of the evil of the present system as is not imaginary, what and where is the remedy? Without any progress toward a satisfactory result, search for it has been prosecuted for years and years.

In Germany, and perhaps elsewhere on the European continent,

the following method has been established. For certain matters and lines of business (I have not ascertained what these are) permanent experts are appointed by the state. They have no official title nor regular salary, and their payment barely compensates them for loss of time. But in most cases the expert is appointed by the particular judge sitting in the case. He may appoint any man suggested by both parties, or he may also appoint a third man not suggested by either; but if both parties agree on one man, he *must* be appointed. If a question is involved for which the regular permanent experts are provided, these only can be appointed. The only essential qualifications of the expert are that he should follow the particular line of business to which the inquiry relates, for the purpose of earning his living. The number of experts testifying in a case is not limited by law, but (as with us) it rests in the discretion of the presiding judge.

The manifest, and to my mind the fatal, objections to this method are: the compulsory appointment, in certain cases, of the permanent experts; the denial of the right (a constitutional right in this country) of a party to select his own witnesses; and the absence of the qualification of professional learning and ability. For I fully agree with the observations of Dr. Henry Smith Williams, in the North American Review for February, 1897, that "mere average medical knowledge does not supply proper qualifications for expert testimony in all kinds of cases; as, for example, in cases involving chemical or microscopical examinations, or inquiries concerning mental conditions, — cases demanding the use and application of quite different kinds of technical knowledge. A physician may have the best professional training and the highest standing in his profession, and yet be utterly incapable of making a thorough microscopical or chemical examination, or of forming a really competent judgment as to the mental condition of an obscure case of alleged insanity. Clearly then a man should not be permitted to qualify as an expert simply because he has good professional standing as a physician." And an American judge, unless greatly deceived, will not permit a clearly incompetent person thus to qualify.

There have been in this country so many advocates of the German method, that it would seem that the experiment would have been tried in some one at least of the States of the Union if the sentiment of the legal profession had not been quite strong against it; contrary to the opinion of Mr. Clemens Herschel, civil engi-

neer, who, mistakenly, understands that "great unanimity exists among professional men in the choice of a remedy."[1] Mr. Herschel would have the expert witness appointed by the court; but would also permit the parties in a suit to employ others, according to the present practice. A similar plan is advocated by an anonymous writer in 5 American Law Review, 227, 248. But it seems to me this plan would only aggravate the existing difficulties, by tending to place three instead of two classes of experts in antagonism.

Prof. John Ordronaux is one of many who are in favor of having expert witnesses appointed by the court, and excluding all others. He thinks "the expert should be regarded as an *amicus curiæ*, whose opinion should be a conclusive judgment."

That condition would seem to destroy his function as a witness, leaving him to *instruct* the judge as to what is the fact, and the judge to instruct the jury accordingly, — a theory and practice obnoxious in the extreme, and subversive of the rule that the jury alone shall determine all questions of fact. "The expert," he says, "should be in no sense a witness. He should have his *status* defined, should be free from alliances with either party, and give his opinion only upon an *agreed* statement of facts."[2]

The learned Professor does not inform us by what process the court shall compel contending parties to agree.

And he goes on to announce the following novel proposition: "Remove all experts from the field of testimony, and place them in that of *arbitration*. Whenever a scientific question arises whose solution is material, let a *feigned issue* be made upon the points and referred for judgment, upon evidence agreed upon, to three experts, one to be selected by each party litigant and the third by the court, such experts to sit and determine at once the question in dispute, and their opinion to be received by the jury as conclusive of the issue tried by them. And, with a view to secure economy in time from the application of these views to practice, counsel desiring to invoke the assistance of experts should be required to give notice to the court and opposite party of such intention, so that the scientific issue upon which their services will be required could be tried in advance, and the ordinary course of judicial proceedings at *nisi prius* not be interrupted by the interpolation of new and exceptional matter. We need not point out," he says, "how much this would tend to simplify and abridge trials."[3]

[1] 21 Am. Law Rev. 572.

[2] See also 5 Am. Law Rev. 442.

[3] 9 Albany Law Journal, 122.

A writer in the same volume (p. 146) combats this proposed remedy, while advocating another not less unique. He remarks, very truthfully, that "a feigned issue in a trial for murder, for instance, would strike many as singular"; and then he proceeds to announce a plan which will strike many others as scarcely less singular: "Why not authorize the court to associate with itself an expert who, jointly with the judge, would preside at the trial, direct and control the examination of witnesses, and sum up at the close before the summing up by the law judge. After his summing up, and before the jury are charged by the court, there would be an opportunity of questioning him fully with respect to all points not previously developed in the course of the trial. All hypothetical examination would thus be excluded; testimony, science, and law would all be fully brought out, and all confined to the matter in hand."

I have no comment to make concerning this proposition other than that such a composite tribunal of "testimony, science, and law" would, as it seems to me, not only "strike many as singular," but would not be entertained for a moment by any practical lawyer.

In Massachusetts, efforts have been made at frequent times during the last twenty years to procure legislation on this subject, but no proposed scheme has found favor with the legislature. In New York, Pennsylvania, Illinois, and, I presume, in other States, attempted legislation in this direction has only encountered defeat. The latest effort was in February of this year, when the Massachusetts Medico-Legal Society and the Boston Medico-Psychological Society joined in the construction of a bill which was urged before the Judiciary Committee of the House, but was not approved by that body. The bill provided that the parties to any proceeding in court, before the trial, may agree upon an expert who shall make such an examination of the case as may in his judgment be necessary and practicable, who shall give his written opinion thereon, and shall attend the trial of the cause and answer such questions as may be put to him. If the parties do not agree, the court, or any judge in vacation, may appoint one or more persons learned in the special branch or branches of the science or medicine involved in the case. These persons, if more than one are appointed, shall confer and give their opinion in writing. If they do not agree they shall state in writing the points upon which they differ. If the parties do not agree, the court, upon motion of either party, or

upon its own motion, may appoint. The compensation of these experts shall be fixed by the court and paid by the county, but the defeated party shall refund the amount so disbursed. No medical expert shall be admitted to testify before any court except as thus provided, and except in criminal cases, in which the defendant may call other medical expert witnesses, at his own cost, and in such case like witnesses may be called and examined by the Commonwealth.

Before the preparation of this bill, the subject had been extensively discussed by some of the most learned doctors and jurists in Massachusetts, — among them Dr. J. J. Putnam, Dr. H. I. Bowditch, Dr. John L. Hildreth, the late Professor and Judge Emory Washburn, and the late Professor and Chief Justice Joel Parker, without any uniformity of conclusion. Dr. Putnam was of the opinion that great advantages would be gained if experts "instead of being restricted to the answering of hypothetical questions, so framed by counsel as to accentuate their differences of opinion, were allowed to fully explain and discuss the case, a proceeding which would often bring out their points of agreement, and prevent their differences from standing out in full and often partially false relief."[1] In my opinion, the learned doctor is mistaken in assuming that the defect of which he complains does in fact exist to any considerable extent. It is the result of my own observation and practice that the expert witness is not thus "restricted," but that, within the scope of a broad latitude, an intelligent medical witness is allowed and encouraged, and indeed often required, to "fully explain and discuss the case."

It has been proposed that "a certain number of scientific men should, in certain circumstances, sit upon juries and hear the evidence, as ordinary juries do at present." Upon this suggestion two important questions arise, which I find myself unable to answer: 1. How shall these subsidiary jurors be selected? 2. Would they be any more likely to agree in the jury box than on the witness stand?

Dr. H. S. Williams, in the article before referred to, suggests the novel proposition that the "real expert should be sifted from the pseudo expert by the process of searching civil service regulations." The manifest objections to this arrangement are these, among others: it would seem to be impossible to constitute a Scientific Civil Service Board, the members of which would themselves

[1] Boston Med. & Surg. Journal, Feb. 11, 1897.

possess all or even a considerable proportion of the qualifications for the examination of candidates in all the various branches of science concerning which experts are called to testify, and equally impracticable to establish and maintain the requisite large number of independent Civil Service Boards.

The proposal to have medical experts selected by and serve as advisers of the court, instead of being employed by the plaintiff and defendant, has been met on the part of our best lawyers and judges (among them the distinguished Chief Justice Joel Parker) by the statement that such restrictions would interfere with the fundamental and constitutional right of a litigant to summon and employ any one whom he sees fit in behalf of his cause. I am unable to discover any answer to this objection.

Judge Washburn, while in favor of continuing the present method of summoning experts, thought the presiding judge should have power himself, if in his judgment the interests of justice would be promoted thereby, to summon experts of his own choice, who should review the whole testimony and evidence of the experts called by the litigants. The proposition strikes me favorably; and I can see no legal objection to legislation (if legislation be required, as probably it is not) to that effect. If the scheme be opposed on the ground that a party is thus compelled to accept the testimony of a witness not of his own choice, the answer is, that each party, while not restricted in his own choice, is *now* compelled to accept a witness chosen by his adversary; and it cannot be less in the interest of justice that both parties should be compelled to accept the additional testimony of a witness called by an unbiased and indifferent judge.

With reference to a jury or other tribunal composed wholly or in part of experts, one of the most eminent of English jurists, the late Sir James Fitzjames Stephen, discovered so many "difficulties of detail and practice" in the adoption of any such plan, that it seemed, in his judgment, to be most injurious. It was his opinion (in which I fully concur) that, "given uprightness, patience, and such intelligence as most educated members of society possess, a jury constituted as our juries are forms the very best tribunal which could be devised for the trial of complicated questions of fact, even if those questions involve delicate scientific considerations."[1]

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[1] 2 Juridical Society Papers, 238.

It seems to me that such men as ordinarily compose our juries are more likely to arrive at an unprejudiced and correct conclusion than a jury of experts, or a jury bound by the decision of experts. Certainly such men will be uninfluenced by pride of opinion or professional rivalry. I am strongly of the opinion that, aided by all the machinery and appliances which courts of law afford for the ascertainment of truth, in cases civil and criminal, and no matter how complicated, — namely, certain well defined rules of practice established by law and by the sanctioned experience of ages, among which are a broad latitude of examination and cross-examination, in which the court often participates, and the liberty which is usually given a scientific witness for explanation and illustration, — ordinary men are quite capable of forming a trustworthy conclusion. I say trustworthy; for that is all that can be expected or required. Comparatively few subjects of expert testimony are capable of absolute demonstration; and the judgment of a jury or an expert is ordinarily no more certain than that the conclusion, in a civil case, is *probably* correct, and, in a criminal case, that the accused is *probably* innocent, or that his guilt is established beyond a reasonable doubt.

Finally, my belief is, that the supposed evils of the present system are much exaggerated, and to a great extent imaginary; that they are not to be cured by any remedy that has been or seems likely to be devised, and that, on the whole, it is best to "let well enough alone."

The scientific expert should be paid *as such*. "He is not a witness in the ordinary sense, unless called merely to testify to some fact which he has observed, — and then he is not an expert. His position and office is that of sworn interpreter of science to the court." To illustrate. Stained garments are placed in the hands of a chemist to decide the significance of those stains by scientific tests. His chemical reagents show them to be blood stains, and a microscopical test shows that the blood is that of a fish or reptile. His testimony does not connect those garments with the prisoner, and has nothing to do with his guilt or innocence. As a *witness* he has added no *fact* to the record. The stained garments were there already, — but by scientific processes he interprets for the court those discolorations, and makes legible what was written in blood on the clothing. This is professional work, accomplished only after and by means of long, patient, and costly study, and for this service he is as much entitled to compensation as the lawyer whose

long years of patient and expensive study have qualified him to practise at the bar.[1]

Dr. Putnam (in the Boston Medical and Surgical Journal, October 22, 1896) gives some advice to his professional brethren which seems to me worthy of serious consideration. He says: "As a matter of fact, we go into court prepared to accentuate our differences and to minimize our agreements, and this unedifying state of affairs is partly due to the fact that we enlist ourselves too much as lawyers on one and the other side. . . . Our legal colleagues expect too much when they ask us to give only that portion of our views which makes their side of the argument appear stronger. . . . It is more common to hear the truth told than the whole truth. . . . Experts who trust one another should more frequently seek the privilege of consultation together before appearing in court. . . . There is room for real and reasonable disagreement between experts, but I think we might at least agree in seeking to *bring about early settlements*, on the ground that, so far as one can judge, the plaintiff, the defendant, and the community would generally be the gainers. . . . In this direction physicians can do much to educate the public mind, provided only they act in concert."

Dr. Walton, in the periodical last cited, remarks: "I think one of the dangers in giving expert testimony is the tendency for the expert to feel that he carries the whole case on his own shoulders, and must decide questions that ought to be left to the jury. . . . Finally, the scientific witness should come into court with clean hands and a pure heart; with sincerity of purpose; with a tendency and desire to ascertain and recognize truth wherever it may be found; to conceal nothing; mindful of his oath, which requires him to speak not only the truth, but the whole truth."

In the language of another: "His testimony should be the colorless light of science brought to bear upon the case. . . . To the true expert, in that responsible position, the utterance of half truths should be simply impossible."

*William L. Foster.*

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[1] Dr. W. W. Godding, in 138 North Am. Rev. 608.